Supreme Court, U.S.
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No._____

In The

Supreme Court of the United States

October Term, 1992

600 WEST 115TH STREET CORP.,

Petitioner,

-against-

ROBERT VON GUTFELD,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF
THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals of the State of New York, in finding words spoken in a public forum to be constitutionally protected, as words which could not reasonably be interpreted as factual statements, abused its discretion in applying the principles enunciated by this Court in *Greenbelt Cooperative Publishing Assn. Inc. v. Bresler* and *Milkovich v. Lorain Journal Co.*

2. Did this court in *Milkovich v. Lorain Journal Co.* preclude contextual analysis of the challenged statements so as to truncate the methodological approach elucidated in *Ollman v. Evans*?

PARTIES

The names of all parties to the proceeding in the Court whose order and judgment is sought to be reviewed here appear in the caption of the case.

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OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York is officially reported as *600 West 115th Street Corp. v. Robert Von Gutfield*, 80 N.Y.2d 130 (1992). It appears in Appendix C hereto at A4-A19. The opinion of the New York State Supreme Court, Appellate Division, First Department, is officially reported at 169 AD2d 56 (1991). It appears in Appendix I hereto at A31-A47. The opinion of the New York State Supreme Court at a nisi prius part dated April 20, 1990 is not officially reported. It appears in Appendix K hereto at A54-A59.

STATEMENT OF JURISDICTION

The order and judgment of the Court of Appeals of the State of New York was entered on October 20, 1992. Petitioner made a timely motion for reargument to the Court of Appeals. The Court of Appeals denied petitioner's motion for reargument by its order dated appears December 21, 1992. The order of denial appears in Appendix A hereto at A1. This petition is filed, in accordance with Rule 13.1 of this Court, within 90 days of the date of denial of discretionary review (motion for reargument).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988) because an immunity is claimed under the Constitution.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision is as follows:

AMENDMENT 1

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This action for slander had its genesis on October 11, 1988 at a public hearing before a local Community Board. A public hearing had been called to discuss petitioner's application for an enclosed sidewalk cafe. (Appendix D at A20-A21.)

Petitioner had not received permission to operate an enclosed sidewalk cafe nor was any permit or license issued it. The meeting was held to enable the residents of the community to express their

sentiments regarding the construction of an enclosed sidewalk cafe, prior to the Community Board's actual vote.

The Community Board's role was advisory only (Appendix G at A28). Petitioner's application required the final approval of the New York City Board of Estimate (Appendix L at 60)

Petitioner on October 11, 1988 operated a restaurant as the lessee of commercial space from a Commercial Condominium owner.

Respondent was a cooperative residential owner in the same building in which petitioner's restaurant had been located.

Respondent spoke in opposition to petitioner's application. His statements were recorded. They are set forth both in petitioner's amended complaint. (Appendix J at A48-A53); and in respondent's transcript of his remarks (Appendix F at A23-A24).

Respondent identified himself as a resident of the building for 32 1/2 years, as having been Chairman of the Board of the Condominium, a member of the tenant's committee for 12 years; and as having served as head of the steering committee for two years.

In the course of his oral remarks respondent made the following statements:

> "The place has been denigrated by this restaurant and is going to be denigrated further."
>
> * * *
>
> "Now they want to take the sidewalk away... Because they have an illegal lease with Coronet that said they could take the sidewalk."
>
> * * *
>
> "Therefore this entire lease and proposition [the word found in plaintiff's transcript] composition [the word

> found in defendant's transcript] is as fraudulent as you can get and it smells of bribery and corruption."
>
> * * *
>
> "The contract is in complete discompliance with everything Consumer Affairs said; and I have the correspondence which says no restaurant is to be built unless the Condominium Board gives permission."

Respondent's remarks were consistent with his statement to petitioner's principal on October 10, 1988 - one day prior to the meeting - when he accused petitioner of bribing the City of New York to receive a license for the sidewalk cafe. (Appendix H at A29-A30.)

Those remarks find similar sentiment in respondent's written statement contained in the "Registration To Speak at the Public Session" form which he gave the Community Board on October 11 prior to his speaking. In that statement he wrote:

> "...Consumer Affairs wrote they would issue no permit without Condo Board approval. They did anyway. The permit is therefore fraudulent." (Appendix E at A22.)

Respondent at his deposition before trial admitted that he did not recall using the words "smells of bribery and corruption." He conceded that petitioner's application for a sidewalk cafe had not been granted. He had no idea who had been defrauded (Appendix G at A25-A28.)

The Supreme Court at a nisi prius part found that respondent's statements,

> "i.e., bribery, corruption, fraudulent activity, in the context and place where they were made, are not

> clearly susceptible to only one interpretation..."
> (Appendix K at A59.)

It denied respondent's cross-motion to dismiss the complaint as a matter of law.

The New York Supreme Court, Appellate Division, First Department, affirmed the lower court's decision.

It found that the petitioner alleged slander per se in its complaint, since bribery "is an indictable offense." (Appendix I at A39.)

It also determined that the words complained of, "in the context of the entire communication and of circumstances in which they were spoken" raised triable issues of fact.

Significantly the court recognized that:

> "We do not believe that one can, as a matter of law, decide how the average person, hearing defendant's allegations, would interpret same as to whether or not plaintiff had actually bribed corrupted or otherwise obtained the license by some fraud..."
> (Appendix I at A40.)

The court "strongly endorsed" the Constitutional principle that:

> " '...no First Amendment protection enfolds false charges of criminal behavior" *Rinaldi v. Holt, Rinehart & Winston*, 42 NY2d 369, 382 (1977)...' "
> (Appendix I at A41.)

The court also held that:

> "...punitive damages may be recoverable herein, since defendant's liability may be based upon a showing of knowledge or false or reckless disregard for the truth (*Gertz v. Robert Welch, Inc., supra*, at 348-350)."
> (Appendix I at A43.)

The Court of Appeals of the State of New York reversed the order of the Appellate Division; and it dismissed the complaint.

The Court of Appeals applied the principles in *Milkovich v. Lorain Journal Co.*, 497 US___, 111 L Ed 2d 1 (1990) and *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. ___ 6 (1970) to respondent's speech in a public forum. It held that his remarks were "constitutionally protected" as statements of "opinion and advocacy and not a presentation alleging objective fact." (Appendix C at A18.)

It concluded:

> "...that as a matter of Federal constitutional law summary judgment for the defendant is warranted." (Appendix C at A18.)

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES THE NOVEL ISSUE WHETHER THIS COURT WILL PROTECT SPEECH MADE IN THE CONTEXT OF DEBATE IN A PUBLIC HEARING WHICH OTHERWISE WOULD BE DEEMED SLANDEROUS UNDER THE PRINCIPLES ENUNCIATED IN *MILKOVICH V. LORAIN JOURNAL CO.* AND *GREENBELT COOPERATIVE PUBLISHING ASSN. INC. V. BRESLER.*

The Court of Appeals of the State of New York interpreted *Milkovich v. Lorain Journal Co., supra,* in its reaffirmation of the Bresler- Letter Carriers - Falwell line of cases as mandating that respondent's words spoken in a public forum, constituted a protected speech.

The Court of Appeals observed that words, literally actionable, become:

> "a hyperbolic type of speech only by reference to the circumstances or context in which it is used."
> (Appendix A at A13.)

The court relied on *Greenbelt Cooperative Publishing Assn. Inc. v. Bresler*, 398 U.S. 6 (1970), as dispositive of the facts in this case.

The court found relevant that the speakers were citizens, the debate was heated and the forum was an official governmental session.

It is respectfully submitted that the Court of Appeals overlooked a critical distinction between *Greenbelt* and the case at bar.

In this case, respondent was unknown to the community at large. He introduced himself as a person possessing expert knowledge - his litany of positions held in the Condominium included his serving as Chairman of the Board - and as a person possessing information not otherwise available to the public.

Bresler, in contrast was a known personality whose negotiating position was debated and publicized over a period of time. This court noted:

> "...It was Bresler's public and wholly legal negotiating proposals that were being criticized..."
> (*Id.* at 14).

In contrast, respondent in this case was attacking petitioner's character and conduct, not the proposition before the public. The cumulative accusations that petitioner had an illegal lease, that the proposition [or composition] was "as fraudulent as you can get; that "it smells of bribery and corruption" could reasonably be understood by the diverse public that petitioner had committed crimes.

The Court of Appeals - arrogating to itself the role of trier of the facts where words could be susceptible of more than one meaning - exceeded its authority by postulating a public either too incredulous or too cynical to react to accusations of criminal conduct.

The Court of Appeals, in finding that the words "smells of" connotes only generalized suspicions, transmuted the plain meaning of words and reduced the decision as precedent to intuitive word-play.

II. THIS CASE COMPELS THIS COURT TO DEFINE ITS PARAMOUNT ROLE IN INTERPRETING PROTECTED SPEECH. THE COURT OF APPEALS OF THE STATE OF NEW YORK INTERPRETS *MILKOVICH V. LORAIN JOURNAL CO.* AS PROSCRIBING CONTEXTUAL ANALYSIS OF CHALLENGED STATEMENTS. BY POSITING THAT *MILKOVICH V. LORAIN JOURNAL CO.* PERMITS ONLY A "TRUNCATED" ANALYSIS OF CHALLENGED STATEMENTS, THE COURT OF APPEALS WILL PRECLUDE THIS COURT FROM FURTHER REVIEW BY ALSO RESTING ITS DECISION ON INDEPENDENT STATE GROUNDS. THIS COURT'S RESPONSIBILITY TO INTERPRET FEDERAL QUESTIONS OF CONSTITUTIONAL MAGNITUDE WILL THUS BE THWARTED.

It is no coincidence that the decision in this case was written by Judge Richard D. Simons.

In his concurring opinion in *Immuno AG v. Moor-Jankowski*, 77 NY2d 235, Judge Simon criticized the majority as having:

> "...rendered an interpretation of *Milkovich* which is narrower than necessary to review the matter before us and one which appears, from statements in the *Milkovich* opinions, to be far more constricted than the Supreme Court intended." *Id.* at 257.

Judge Simons recognized the inherent frustration of the Supreme Court's jurisdiction to review a Federal question,

> "...if the decision of the State court is also based on adequate and independent State grounds (citations omitted)." *Id.* at 61.

He chastised the majority of the Court of Appeals in *Immuno AG v. Moor-Jankowski* for having precluded this court from resolving

> "...these differences over the scope of the protection afforded by *Milkovich*..." *Id.* at 257.

Constrained by the Court of Appeals decision in *Immuno AG v. Moor-Jankowski*, Judge Sumon in the instant case reiterated that:

> "...the Court interpreted *Milkovich* as, in effect, truncated the widely used methodology first laid out in *Ollman v. Evans* (750 F.2d 970, *cert. denied* 471 U.S. 1127)..." Appendix C at A11-A12.)

As construed by the Court of Appeals, *Milkovich* substituted a "type of speech" test in place of the analysis of the "full context of the statement" and the "broader social context or setting of the communication." (Appendix C at A12.)

The pernicious effect of the Court of Appeals interpretation of *Milkovich* is that, were this court to reverse the Court of Appeals under the "type of speech" test, the Court of Appeals nevertheless will affirm its prior holding on independent State grounds by applying the four-part *Ollman v. Evans* analysis.

The Court of Appeals interpretation of *Milkovich*'s scope of protection is at variance with at least one United States Circuit Court of Appeals decision.

In *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724 (1991) (First Circuit), the court said:

* * *

> "...while eschewing the fact/opinion terminology *Milkovich* did not depart from the multi-factored analysis that had been employed for some time by lower courts seeking to distinguish between actionable fact and nonactionable opinion. See, e.g. *McCabe v. Rettner*, 814 F.2d 839, 842 (1st Cir. 1987) (adopting totality of the circumstances analysis); *Ollman v. Evans*, 750 F.2d 970, 974-75 (D.C. Cir. 1984) (enbanc) (same). *Id.* at 727.

This court's jurisdiction to review a Federal question and to pronounce Federal law will continue to be thwarted in the State of New York, unless this Court accepts Judge Simons invitation in *Immuno* to define the scope of protection afforded speech under *Milkovich* by declaring emphatically that it adopts the contextual analysis enunciated in *Ollman, supra.*

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the Court of Appeals of the State of New York.

DATED: March 15, 1993

Respectfully submitted,

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APPENDICES

APPENDIX A

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-first day of December A.D. 1992

Present, HON. RICHARD D. SIMONS, Acting Chief Judge, presiding.

Mo. No. 1267

600 West 115th Street Corp.,

Respondent,

v.

Robert Von Gutfeld,

Appellant.

A motion for reargument to the Court of Appeals in the above cause having been heretofore made upon the part of the respondent herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX B

Remittitur

Court of Appeals
State of New York

The Hon. Sol Wachtler, Chief Judge, Presiding

1 No. 166

600 West 115th Street Corp.,

Respondent,

v.

Robert Von Gutfeld,

Appellant.

The appellant in the above entitled appeal appeared by Ayers & Thompson, P.C. and Gold & Wachtel, Esqs.;

The respondent appeared by David S. Friedberg, Esq.

The Court, after due deliberation, orders and adjudges that the order is reversed, with costs, defendant's cross motion for summary judgment dismissing the complaint granted and certified question answered in the negative. Opinion by Judge Simons. Chief Judge Wachtler and Judges Kaye, Titone, Hancock and Bellacosa concur. Judge Smith took no part.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/Donald M. Sheraw
Donald M. Sheraw,
Clerk of the Court
Court of Appeals, Clerk's Office,
Albany, October 20, 1992.

APPENDIX C

State of New York
Court of Appeals

600 West 115th Street Corp.,

Respondent,

v.

Robert Von Gutfeld,

Appellant.

80 NY2d 130
OPINION OF THE COURT

John H. Reichman, for appellant.
David S. Friedberg, for respondent.

SIMONS, J.

Plaintiff seeks to recover damages for allegedly defamatory statements made by defendant in opposition to plaintiff's application for a building permit during a public hearing conducted by a New York City Community Board. Defendant contends that his statements were absolutely privileged under the common law and that they were protected speech under the State and Federal Constitutions. We conclude the statements were constitutionally protected and therefore reverse the order of the Appellate Division and grant defendant's motion for summary judgment dismissing the complaint.

I.

The events giving rise to this litigation occurred in the fall of 1988 during a public hearing. Defendant, Robert Von Gutfeld, was one of several persons to speak in opposition to a proposal by the plaintiff corporation to create a sidewalk cafe adjacent to its restaurant in Manhattan. The restaurant had opened the year before on the ground floor of an apartment building where Von Gutfeld had resided for more than 30 years. At the time the proposal was put forward, the plaintiff was leasing its space from Excelsior Associates, owner of one of the building's four ground-floor commercial condominium units, which, together with the cooperative residential units in the upper floors, comprised a condominium governed by a Board of Managers.

In the months leading up to the public hearing, plaintiff had begun the process of seeking City permission to create its sidewalk cafe. The City Department of Consumer Affairs initially rejected the application because plaintiff had failed to get the approval of the building's Board of Managers. Subsequently, plaintiff submitted to the Department an affidavit of consent from Excelsior, its landlord. In response, and apparently confused by the document before it, the Department informed the Board of Managers it was proceeding on the application because it had what appeared to be a valid consent. Months later, the Department discovered its error and reversed itself, but it was during this period of confusion about the City's position that Community Board No. 9, pursuant to the City Charter, held a public hearing on plaintiff's proposal.

Von Gutfeld had served as president of the condominium's Board of Managers from March 1985 to June 1988, and at the time of the hearing in October 1988 he was a member of the Board's Building Committee. During his time as president, he had complained about a number of problems with the restaurant, including smells in the building and parking problems caused by restaurant employees. When he arrived at the hearing, Von Gutfeld filled out a registration

statement, indicating that he wished to speak against the sidewalk cafe and stating his belief that the "permit [from Consumer Affairs] is*** fraudulent." After plaintiff's representatives and one neighbor spoke in favor of the project, several persons, including Von Gutfeld, were recognized and stated their objections. The parties now disagree about the transaction of some parts of a tape recording of the hearing, but both sides acknowledge that Von Gutfeld once more raised the problems with smells and parking congestion and complained that the restaurant "denigrated" the building. He went on to say:

> "Why do they want to do it? Because they have an illegal lease with Coronet [plaintiff's prior landlord] that said they could take the sidewalk."
>
> "Therefore this entire lease and proposition [the word found in plaintiff's transcript]/composition [the word found in defendant's transcript] is as fraudulent as you get and it smells of bribery and corruption."

He then concluded, "No such permission [from the Board of Managers] has ever been granted and we sure as hell are not going to grant it now," and then he hit the table with his hand. The audience applauded.

Following the meeting, the Community Board voted against plaintiff's application. Later, in March 1989, the Department of Consumer Affairs ceased processing the application for the sidewalk cafe when it discovered its error and learned that the Board of Managers had not consented.

Plaintiff subsequently commenced this defamation action alleging that three of Von Gutfeld's statements were defamatory: his reference to the denigration of the building, his statement about the illegal lease, and his comments about fraud and the smell of bribery and corruption. Von Gutfeld moved for summary judgment, arguing that the statements were absolutely privileged and that as a

matter of constitutional law, both State and Federal, the statements identified as defamatory made no factual assertions and were therefore not actionable. Supreme Court denied the motion, finding no absolute privilege and holding that "[i]t cannot be said as a matter of law that the average recipient of these statements would not interpret them as meaning that plaintiff had actually bribed, corrupted or fraudulently obtained the license or permit." A divided Appellate Division affirmed.

II

Defendant contends first that his comments are protected under the common law by an absolute privilege extended to those participating in judicial, legislative or executive proceedings. Our cases have made clear, however, that absolute privilege is based upon the personal position or status of the speaker and is limited to the speaker's official participation in the processes of government (*Park Knoll Assocs. v Schmidt*, 59 NY2d 205, 209; *Toker v Pollak*, 44 NY2d 211, 219; *Andrews v Gardiner*, 224 NY 440, 446-447; Restatement [Second] of Torts, tit B, Introductory Note to §585 *et seq.*, at 242-244). An absolute privilege is available only to those who in speaking are discharging a public function arising from the duties of their office (*Park Knoll Assoc. v Schmidt, supra*, at 209-210). Von Gutfeld, unlike the members of the Community Board, had no office at the hearing, and no absolute privilege attached to his remarks. As a speaker at the public hearing, he may have enjoyed a qualified privilege protecting him from liability in the absence of malice (*see generally, Loughry v Lincoln First Bank*, 67 NY2d 369, 376; Restatement [Second] of Torts §598, as the courts below found, but he has not raised that issue before this Court.

III

Defendant next contends that his statements were constitutionally protected opinion under both the Federal and State Constitutions. His argument is undifferentiated although, as *Immuno AG v Moor-Jankowski* (77 NY2d 235) made clear, this Court perceives the protection afforded by the First Amendment of the United States Constitution and that afforded by Article I, §8 of the New York Constitution to be quite different. Our analysis of defendant's claims under the two documents, therefore, is made separately following an examination of the governing concerns in this area. As in *Immuno*, we analyze first the Federal provision, resolving the issue according to our understanding of the holding in *Milkovich v Lorain Journal Co.* (497 US1, 111 L Ed 2d 1), and then examine defendant's rights under the State Constitution. Our determination that the order must be reversed rests on our conclusion that defendant's statement cannot be construed to allege facts under either analysis (*see, Michigan v Long*, 463 US 1032).

A

Nearly 20 years ago, the Supreme Court handed down its landmark defamation decision in *New York Times Co. v Sullivan* "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" (*New York Times Co. v Sullivan*, 376 US 254, 270). The *Sullivan* Court recognized that the protections of the First Amendment were designed to assure an " 'unfettered interchange of ideas for the bringing about of political and social change' " (at 269, quoting *Roth v United States*, 354 US 476, 484) and to maintain "'the opportunity for free political discussion to the end that government may be responsive to the will of the people'" (at 269, quoting *Stromberg v California*, 283 US 359, 369). This scheme of governance embodied in the First Amendment has come to have as its central metaphor the New England town meeting, where citizens

can come forward to be heard in a full and free debate of matters of civic concern.

A Community Board hearing of the sort involved in this case is, in essential ways, the urban equivalent of that town meeting. Though the Boards' recommendations are not binding, the Board is empowered by the New York City Charter of the City of New York (§2800, [d] [17]) to exercise the initial review of land use proposals and to make written recommendations to the City Planning Commission. The conduct of a public hearing is expressly set forth as a step in the Boards' recommendation process under section 2800. In creating the Community Boards, the drafters of the City Charter obviously intended to give meaning and effect to the constitutional guarantees of individual participation in government by providing convenient local forums through which the wishes of New York City residents could be channeled to the City's decision makers.

While conscious of their important role in providing protection to individual reputation, the courts since *Sullivan* have been vigilant about the potential "chilling effect" the threat of defamation actions can have on public debate.[1] Where as here one of the most fundamental forms of citizen participation is implicated, that

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[1] In recent years, there has been a rising concern about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out at public meetings against proposed land use development and other activities requiring approval of public boards. Termed SLAPP suits—strategic lawsuits against public participation—such actions are characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future (*see, e.g., Westfield Partners Ltd. v Hogan*, 740 F Supp 523; Pring and Canan, *Strategic Lawsuits Against Political Participation*, 35 Soc Probs 506). In response, New York State enacted a law specifically aimed at broadening the protection of citizens facing litigation arising from their public petition and participation (*see*, L 1992, ch 767). The statute was enacted after the events of this litigation and is not in issue on this appeal.

vigilance is especially well-founded. Because stringent defamation laws—or, more often, the fear of their imposition—can deter and silence people who would otherwise involve themselves in public debate, the Supreme Court has fashioned broad protection under the Federal Constitution for civic participants, most notably by requiring plaintiffs who are public officials *(New York Times Co. v Sullivan, supra)* or public figures *(Curtis Publ. Co. v. Butts*, 388 US 130) to show actual malice on the part of the defendant *(see also, Gertz v Robert Welch, Inc*, 418 US 323).

Implicit in the *Sullivan-Gertz* line of cases has been the understanding that, when the rules of defamation are drawn too finely, when any erroneous statement is likely to open the statement maker to liability, First Amendment values suffer because would-be communicators, fearing lawsuits, may be reluctant to risk expressing themselves. To avoid that result, and the resulting impoverishment of the public forum, the Court has been willing to allow in some circumstances otherwise valid claims of reputational harm to go uncompensated in order to encourage citizens and media outlets to express themselves freely when matters of public interest are at issue. In the balance to be struck between the State's interest in protecting its citizens from reputational injury and the Constitution's requirement that the State not unduly burden its citizens seeking to participate in the fundamental processes of governance, the scale is not even. We have been guided by these same considerations in explicating the scope of the broader protection afforded by our State constitutional provision *(see, Immuno AG v Moor-Jankowski*, 77 NY2d 235, 248, *supra.)*

Additionally, the courts have not been unmindful of the pragmatic consideration of the remedies available to plaintiffs outside of litigation. Thus, as the Supreme Court has noted, "[t]he first remedy of any victim of defamation is self-help using available opportunities to contradict the lie or correct the error and therapy to minimize its adverse impact on repudiation" *(Gertz v Robert Welch,*

Inc., supra, at 344). Though used in *Gertz* to justify creating different and more burdensome rules for public plaintiffs than private ones, the principle has obvious application in the present case, where a public hearing is involved. A public hearing is, in many instances, the embodiment of self-help. The defamed, in the same setting and with the same audience, has the immediate opportunity to air his competing view. Courts should be reluctant to employ their powers to correct errors uttered in the give-and-take of live public debate when there is reason to believe that the give-and-take itself can adequately, and more appropriately, remedy the wrong. In the words of Judge Learned Hand, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all" *(United States v Assoc. Press,* 52 F Supp 362, 372; *see, New York Times Co. v Sullivan, supra,* at 270).

Under either Federal or State law, the dispositive question is whether a reasonable listener at the hearing could have concluded that Von Gutfeld was conveying facts about the plaintiff *(see, Milkovich v Lorain Journal Co.,* 497 US, at___, 111 L Ed 2d, at 19, *supra; id.,* 49 7US, at___, 111 LEd 2d, at 21 (Brennan, J., dissenting); *Immuno AG v Moor-Jankowski, supra,* at 254; *Steinhilber v Alphonse,* 68 NY2d 283, 290). That is a question for the Court in the first instance *(Steinhilber v Alphonse, supra,* at 290; *and see, Milkovich v Lorain Journal Co., supra).* Because falsity is a necessary element in a defamation claim involving statements of public concern, it follows that only statements alleging facts can properly be the subject of a defamation action. The difficult exercise for the courts, and the place where this Court and the Supreme Court diverge somewhat, is the test or method the court applies to determine whether the challenged statement implies facts.

In *Immuno (supra,* at 245), the Court interpreted *Milkovich* as, in effect, truncating the widely used methodology first laid out in

Ollman v Evans (750 F2d 970, *cert denied* 471 US 1127). Under the four-part *Ollman* test, a court was first to define the words as they were commonly understood and, second, ask whether the statement was subject to verification. From there, the court was to examine the full context of the statement and, finally, the broader social context or setting of the communication (*Immuno AG v Moor-Jankowski, supra*, at 243). The Court concluded that *Milkovich* endorsed the first two steps of the *Ollman* analysis but in place of the last two substituted a "type of speech" test. Only if the expression fell into the narrow category of a protected type of speech (i.e., loose, figurative, or hyperbolic) could the impression that an apparently verifiable assertion was intended (as determined by the first two *Ollman* factors) be negated (*Immuno AG v Moor-Jankowski, supra*, at 243-245). Thus, we stated (at 245) that "except for special situations of loose, figurative, hyperbolic language, statements that contain or imply assertions of provable false fact will likely be actionable" under *Milkovich*. We believed that to be true because the Supreme Court did not expressly consider such contextual factors as the conjectural language and format of the challenged newspaper column, which tended to suggest that the article was opinion and speculative.

The *Milkovich* court did, however, endorse an analysis that examined the "general tenor" of the statement. Moreover, it expressly reaffirmed its holdings in *Hustler Mag. v Falwell* (485 US 46 [no recovery for an ad parody that could not reasonably been seen as stating facts]), *Letter Carriers v Austin* (418 US 264 [use of the word "traitor" in a literary definition of "scab" was not a basis for a defamation action under Federal labor law]), and *Greenbelt Publ. Assn., v Bresler* (398 US 6, 14 [the term "blackmail" used to describe a real estate developer's bargaining position was not defamation when spoken by a citizen at a public meeting or when reported in a newspaper because the term must have been perceived to be "rhetorical hyperbole, a vigorous epithet"]). In referring to those decisions, the Supreme Court examined the general terms of the

statement determining, as we believed in *Immuno* , (*supra* at 244), that "the imprecise language and the unusual setting" would signal to observers that no actual facts were being conveyed.

The Supreme Court's reaffirmation of the *Hustler-Letter Carriers-Greenbelt* lines of cases is significant, for when the circumstances and statements here are compared with *Greenbelt (supra)* and the language used there, the conclusion easily follows that defendant's statements in this case were hyperbolic. Whether the analysis looks to the "general tenor" of the words, the imprecise language, or the setting in which they were spoken, *Greenbelt* indicates that defendant's words were protected speech. The importance of these factors in the analysis is demonstrated by the Court's treatment of the term "blackmail" in *Greenbelt*. Nothing on its face suggest that "blackmail" is hyperbolic. To the contrary, it not only can be defined literally but in many circumstances it would clearly be actionable. Thus, it becomes a hyperbolic "type of speech" only by reference to the circumstances or context in which it is used.

The *Greenbelt* Court recognized as much. Referring to the news accounts of remarks made at a public hearing, the Court stated that "the word 'blackmail'", when spoken "*in these circumstances*" was not slander (at p 13 [emphasis added]) and added: "If the reports had been truncated or distorted in such a way as to extract the word 'blackmail' from *the context in which it was used at the public meetings*, this would be a different case" (*id.* [emphasis added]).

Applying *Greenbelt*, the question becomes: What circumstances, in addition to the literal text of the communication, would the reasonable reader or listener perceive and use in determining whether or not a factual assertion was being made? The *Greenbelt* Court referred to the nature and tone of the City Council sessions where the land development proposal was under official consideration and where citizens made the "blackmail" allegations. "There can be no question," it said, "that the public debates at the

sessions of the city council regarding Bresler's negotiations with the city were a subject of substantial concern to all who lived in the community. The debates themselves were heated, as debates about controversial issues usually are" (*id.*, at 13). Later, the Court noted that the headlines on the challenged newspaper reports "made it clear to all readers that the paper was reporting the public debates" (*id.*, at 14).

Thus, the relevant circumstances were that (1) that the speakers were citizens, (2) the debate was heated, and (3) the forum was an official government session. From these factors, the finding followed that reasonable listeners would not conclude that the speakers were charging the developer with actual crime of blackmail. Citizens do not by their status invite listeners to make the assumption that they have researched the subject and found facts not generally known to others. Reasonable listeners also are aware that impromptu comments at a heated public debate, unlike official testimony before a governmental subcommittee or even the reading of prepared remarks, are more likely to be the product of passionate advocacy than careful, logically developed reason. Finally, the type of forum is relevant because reasonable listeners arrive armed with the knowledge that the deliberations are in progress, that no expertise is required of those who choose to speak, and that robust, controversial debate is expected and frequently encouraged. In short, reasonable listeners in such circumstances arrive with an appropriate amount of skepticism. They come with the expectation that they are, in all probability, going to hear opinion, much of it unpolished and uninformed. They are not expected to parse carefully each statement for fact and opinion; they are expected to be reluctant to conclude—absent clear clues to the contrary from the words or context—that the statements made are to be heard as objective fact. That reluctance, that skepticism, in large part, defines reasonableness under the circumstances.

Greenbelt involved a public hearing. Printed newspaper columns (as in *Milkovich, supra*) differ from a live public debate for purposes of characterizing the reasonable listener/reader and make the case for protection here stronger. A newspaper column is the product of some deliberation, not of the heat of a moment. Prior to publication, it passes through the hands of professional editors and it thus carries with it the cloak of credibility and authority of the particular newspaper and the profession. Its writers work with the knowledge that the printed word can and will be subjected to close, careful, and repeated reading over time. These undoubtedly are circumstances encouraging the reasonable reader to be less skeptical and more willing to conclude that the report is stating or implying facts garnered by a professional news gatherer and reporter. No like factors are present when a private citizen makes an impromptu speech in a heated public debate.

Applying the Federal constitutional principles of *Greenbelt* and *Milkovich* to the comments made by the defendant here, we conclude his remarks were constitutionally protected. Plaintiff's allegations on appeal require that we analyze three statements in Von Gutfeld's remarks: (1) his assertion that the restaurant "denigrated" the building, (2) his claim that the lease and "proposition" or "composition" were fraudulent and smelled of bribery and corruption, and (3) his statement that there was an illegal lease. Our Federal law analysis requires, as we set forth in *Immuno (supra)*, that we begin by, first, looking at the commonly understood meaning of the words and, second, determining whether they are verifiable.

The allegation of "denigration" cannot survive these initial two steps. Whether defined as "casting aspersions on" or "belittling" (Webster's 3d New International Dictionary 602) or by any of its other common meanings, the term falls far short of any requirement of verifiability. It does not state such factually ascertainable phenomena as the diminution of real estate values or the rendering

of the building uninhabitable. It is no more or less factual that a claim that the restaurant "enhanced" the building, and it cannot support an action for defamation.

Von Gutfeld's statement that "the lease and proposition [or composition] is as fraudulent as you get and it smells of bribery and corruption" requires closer scrutiny. Because such words are commonly understood to mean criminal behavior and refer to verifiable acts, the two prongs of the *Milkovich* analysis are met, and we must look to see whether the statements are "loose, figurative, or hyperbolic" or whether the "general tenor" of the Von Gutfeld's remarks negate the impression of factual assertions (*Milkovich v Lorain Journal Co.*, 497 US, at___, 111 L Ed 2d, at 19, *supra* . For the statement to be actionable, we must find that the reasonable listener at the hearing understood Von Gutfeld to be saying that the plaintiff committed fraud and bribery and corrupted City officials or to be implying undisclosed defamatory fact as the basis for the opinion (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 380; Restatement [Second] of Torts §566; *see, Milkovich v Lorain Journal Co.*, 497 US, at ___, 111 L Ed 2d at 13-14, *supra*). We conclude that the remarks spoken at a public hearing would not be so interpreted by a reasonable listener.

First, we note Von Gutfeld's choice of the colloquial and loose terms "smells of" and "fraudulent as you get" in the challenged statements. This is not the language of someone inviting reasonable persons at a heated public hearing to find specific factual allegations in his remarks. Indeed, the figurative "smells of" by its nature conveys to listeners that he has no hard facts, only generalized suspicions. We note also that the statements concerning bribery and corruption are devoid of reference to the plaintiff or any other specific actors. None of his statements about the lease or the sidewalk cafe proposal implies knowledge of a specific criminal transaction, let alone the plaintiff's involvement in such conduct.

While he refers at one point to the condominium bylaws[2] and to correspondence from the Department of Consumer Affairs,[3] he does so in support of the simple, and accurate, proposition that it would violate both the bylaws and the laws of the City to allow a sidewalk cafe absent the approval of the condominium Board of Managers, which exercises ownership rights over the external wall that was to be incorporated into the sidewalk cafe.[4] The references do not suggest that he has investigated beyond that or that he has undisclosed knowledge of any actual transaction involving plaintiff's application.

We note as well the general tenor of the remarks. Von Gutfeld's statement is a rambling, table-slapping monologue, much of it dealing with his past problems with the restaurant and his frustration with the government of the New York City. It could not reasonably be heard as a factual presentation on what the plaintiff was doing to get its permit as much as an angry, unfocused diatribe about the restaurant's presence and life in New York City. Indicative of the statements' tenor and language is the following passage: "My question is when does the City of New York stop giving away public property? We see all over New York the streets are littered with vendors. They don't have insurance. Vendors [inaudible] sell toilet seats. Vendors who sell books. All these things at, at whose expense? The public. We're getting our sidewalks taken away."

---

2 "Well, they can't take the sidewalk because this book was approved by the state attorney general, and on page 73 this book says that the sidewalk is a common element and only the condo of which I was a member for 3 years can decide if and when they should be moved.' "

3 "... I have the correspondence that says 'No restaurant is to be built unless the condominium board gives permission."

4 At the time of the hearing, however, the City Department of Community Affairs had erroneously reported that it was satisfied that permission had been given. The defendant's remarks were largely in response to that error.

Reasonable listeners come to a public hearing with expectations that the speaker is airing a layperson's opinion. Nothing under the circumstances of this hearing or Von Gutfeld's appearance, and certainly nothing about the words uttered themselves, would lead reasonable persons to conclude that they were witnessing a presentation of fact. Thus, given the loose nature of the language, the "general tenor" of the remarks made at a public hearing, and the skepticism a reasonable listener brings to such proceeding, we believe the second statement is not such that a reasonable listener would conclude factual assertions were being made about plaintiff.

The third statement—the allegation that the plaintiff's lease was "illegal" because it "said they could take the sidewalk"—comes closest to asserting an objective fact. Unlike the statements about bribery and corruption, the statement about the lease expressly identifies plaintiff as a party to the transaction. If a reasonable listener would conclude that Von Gutfeld was saying plaintiff was engaged in criminal behavior, the statement would be actionable. The plain language of the statement does not support such a conclusion. Even in the unlikely event that a person at the hearing would reasonably believe a private lease governed a public sidewalk, the listener would need to take the further step and believe that the lessee was engaged in criminal conduct by signing and accepting the terms of the document. At worst the statement alleges nothing more than the lease provision is unenforceable. Thus, we conclude that as a matter of Federal constitutional law summary judgment for the defendant is warranted.

C

The defendant's claim to relief rests on the protections of the State Constitution as well as the Federal. Under the State law analysis articulated in *Immuno (supra)*, Von Gutfeld would also be entitled to summary judgment. In *Immuno*, we endorsed a methodology derived from *Steinhilber v Alphonse*, 68 NY2d 283, *supra*) that

requires that a court look "at the content of the whole communication, its tone and apparent purpose" (*Immuno A.G. v Moor-Jankowski, supra*, at 254). Designed to avoid "the fine parsing*** that might now be required under Federal law" (*id.*, at 255), the State law approach was viewed as better able to "assure that—with due regard for the protection of individual reputation—the cherished constitutional guarantee of free speech is preserved" (*id.*, at 256). When the factors discussed above as part of our Federal analysis are considered under a State contextual analysis, it is clear that, to the existent they make up the "content, tone and purpose" of the communication, they dictate a finding that Von Gutfeld's speech was a statement of opinion and advocacy and not a presentation alleging objective fact. No useful purpose would be served in articulating the difference between the two approaches when the defendant is able to prevail under the narrower Federal test.

IV

Accordingly, the order of the Appellate Division should be reversed, with costs, defendant's cross motion for summary judgment dismissing the complaint granted and certified question answering in the negative.

* * * *

Order reversed, with costs, defendant's cross motion for summary judgment dismissing the complaint granted and certified question answered in the negative. Opinion by Judge Simons. Chief Judge Wachtler and Judges Kaye, Titone, Hancock and Bellacosa concur. Judge Smith took no part.

Decided October 20, 1992

APPENDIX D

EXHIBIT O - NOTICE OF PUBLIC HEARING

/LOGO/
City of New York

CB9M 565 West 125 Street
New York, New York 10027
(212) 864-6200

COMMUNITY BOARD #9, MANHATTAN

Chong
Chairperson

Mildred Duran
District Manager

PLEASE POST

PUBLIC HEARING

DATE: Tuesday, October 11, 1988

TIME: 7 P.M.

PLACE: Community Board No. 9
565 West 125th Street

A G E N D A

ENCLOSED SIDEWALK CAFE - Grandma's
2937 Broadway a/k/a 600 West 115th Street

A21

Application for an enclosed sidewalk cafe with 23 tables and 66 seats at the above location.

INTERESTED COMMITTEES
Housing & Land Use
Economic Development

COMMITTEE

Defendant's Ex D for II N.D. 6/5/89
handwritten

SERVING HAMILTON HEIGHTS/MANHATTANVILLE & MORNINGSIDE HEIGHTS

APPENDIX E

EXHIBIT D - REGISTRATION STATEMENT

/LOGO/
City of New York

CB9M 565 West 125 Street
New York, New York 10027
(212) 864-6200

COMMUNITY BOARD #9, MANHATTAN

REGISTRATION TO SPEAK AT THE PUBLIC SESSION

Please supply the information requested below. Please PRINT clearly as your presentation is a matter of record and will be reproduced for inclusion in the Minutes of the Board.

NAME RJ Von Gutfeld TELEPHONE 212-662-6967

ADDRESS 600 W. 115 ZIP 10021

SUBJECT OF PRESENTATION Grandma's Rest

SUMMARY OF STATEMENT TO BOARD (please limit to 50 words)

The licensing of the cafe extension is in violation of the Black Book of the Coop. Consumer Affairs wrote they would issue no permit without Condo Board approval. They did anyway. The permit is therefore fraudulent.

s/RJ Von Gutfeld
(signature)

APPENDIX F

R. VON GUTFELD:(Loud surge)

Good evening ladies and gentlemen, my name is Robert Von Gutfeld. I've lived at 600 West 115th Street for thirty two and one half years starting as a graduate student at Columbia.

You'll find that our building is a very beautiful building. It was built by a famous architect, Aiello who built many buildings in the neighborhood. The Clairmont... in the area of 115th St. I don't think his building needs beautification with a restaurant. I think he knew what he was doing. Its a beautiful building. It is close to UI building. It certainly will not be edified or graced by a restaurant. My question is when does the city of New York start giving away public property? We see all over New York the streets are littered with vendors. They don't have insurance. Vendors UI sell toilet seats. Vendors who sell books. All these things at, at whose expense? The public. We're getting our sidewalks taken away. Now it so happens UI chairman of the board of this condominium for three years. the tenant's committee for twelve. head of the steering committee for two. I'm very familiar with the building. I'm very familiar with the hundreds of violations that we have suffered UI restaurant that UI in place. When they opened up, the stench from the ventilators was so great that we fought for hours at board meetings to do something about it. Finally Mr. Mamaes said, "Yes, there's something wrong." "I'll put in a new system." We waited twelve weeks for that system to be put in our lobby sm... UI a grease pile and it still stinks because there is no way to ventilate that properly without a chimney that goes up twelve floors or higher than the nearest building. The place has been denigrated by this restaurant and its going to be denigrated further. The people that work at Mamaes (UI) illegally. Our crosswalks are taken up. You want evidence. Call the 26th precinct. I've reported Mamaes dozens of times. They block the entire

crosswalk with their car sit down in Mamaes Restaurant and think they can get away with it.

Well. I'm sick of that and I've reported it and the police occasionally give tickets. Now that they've taken the crosswalk away, they want to take the sidewalk away. And who's to benefit? Their benefit. Why do they want to do it? Because they have an illegal lease with Coronet that says they can take the UI walks. Well they can't take the sidewalk because this book was approved by the state attorney general and on page 77 this book says that the sidewalk is a common element and only the condo of which I was a member for 3 years can decide if and when they should be moved. Therefore this entire lease and composition is as fraudulent as you can get and it smells of bribery and corruption. What they want to put to the people of New York. Give the restaurants UI. Give 'em the subway, platforms so that the vendor can hawk and we, the people are left with nothing. We have 7 feet left to walk. Try to get a wheelchair through that. (coughs) People walk in the other direction when this proposed beautification takes place. On top of that we have pipes running UI type of restaurant and UI has refrigeration plan UI illegally. One of them exploded and took practically our whole basement.

That's how you're in compliance with the law. The contract is in complete discompliance (hits table) with everything Consumer Affairs says, and I have the correspondence that says "No restaurant is to be built unless the condominium board gives permission. No such permission has ever been granted and we sure as hell are not going to grant it now. (Hits table) Thank you.

APPENDIX G

Von Gutfeld

A You can ask. What would you like?

Q Did you personally communicate with any member of any city agencies between November of 1987 and October 11th, 1988, regarding the application of the plaintiff for a sidewalk cafe?

A No.

Q Did you direct anybody to communicate with any city agency?

A Yes.

Q Who did you direct?

A Errol Brett, our attorney.

Q Do you recall when you requested Mr. Brett to communicate this?

A This was around, this time everything was around November of 1987.

Q I show you sir, a writing dated April 28th, 1988 which was initially, it was marked in a prior examination. I do not have the identification of it. I will ask that it be remarked for these purposes as Exhibit number 14.

(Whereupon, the above referred to document was marked, "Plaintiff's Exhibit 14, for identification" as of

* * * *

MR. VENTURA-ROSA: Can you provide me with a copy of that?

MR. FRIEDBERG: Yes, I can. but isn't the Community Board going to provide you with one?

Q Could you look at the last word in that statement, sir? The last word is, "fraudulent", am I correct?

A Correct.

MR. VENTURA-ROSA: The document speaks for itself.

Q Who was defrauded, sir?

A I have no idea.

Q Who was the fraud perpetrated against, sir?

A I have no idea.

Q Now, you attended that meeting, did you not?

A Certainly.

Q And, and you were also a speaker at that meeting?

A Yes.

Q Could you tell us to the best of your recollection what you said at that meeting?

* * * *

in writing, the fact that a permit is not to be issued by the Consumer Affairs without permission of the board and yet the Consumer Affairs has issued this in spite of this written disclaimer.

And then I said, how do we explain that, that certainly sounds like something very wrong somewhere. I never mentioned anything else.

Q Do you recall if you used the words, it smells, "It smells of bribery and corruption"?

A No, I do not recall that.

Q Now, sir, to the best of your recollection, is that the full statement that you made to the board and to the people present?

A Correct.

Q Did you or anyone, to your knowledge, take any notes of the statements that you made to the board?

A No.

Q To your knowledge, did anyone—

MR. VENTURA-ROSA: No, they did not or no, you do not know?

A Not to my knowledge.

Q To your knowledge, was any audio

* * * *

that application as to whether it was proper or improper?

A Well, I was shocked.

Q Was —

A And frankly felt that we had been betrayed by whom, I have no idea.

Q Was it your understanding that the reversal was improper?

A Definitely.

Q Do you know if any action was taken by the Community Board at the October 11th, 1988 meeting on the application?

A Yes, well, the Community Board really only has advisory power. The Community Board voted unanimously, that is, the Community Board makes a recommendation. It was unanimous.. The board by its entire membership of the Community Board, that there be no permission given by any agency for such an application for the extension of this outside cafe be approved.

Q Do you know if that application has been granted today?

A To the best of my knowledge that application has not been granted. It has been turned down

APPENDIX H

MAMAES

Q Did you have an occasion, sir, prior, at any date prior to October 11th speak to Mr. Von Gutfeld personally?

A Yes.

Q And do you recall when you spoke to Mr. Von Gutfeld prior to October 11th, 1988?

A The day before on the 10th.

Q Can you tell us, sir, where that conversation took place?

A Outside of Grandma's, 115th Street.

Q And do you recall, sir, approximately what time of day it was?

A I would say between 2:00 and 3:00 in the afternoon.

Q Do you recall, sir, at that time what Mr. Von Gutfeld was doing inside Grandma's?

A Yes, he was collecting signatures from the people in the street to not, to collect signatures for the sidewalk cafe for not erecting the sidewalk cafe.

Q Did you have a conversation with Mr. Von Gutfeld at or about that time?

A Yes.

Q Can you tell us what Mr. Von Gutfeld said to you, if anything?

A Yes, I was leaning to the building and Mr. Von Gutfeld came there. I said, Mr. Von Gutfeld, what are you doing? Why are you

doing this? And he said to me, "We do not want this. It is enough for the restaurant. We do not want the sidewalk cafe. We do not want the City to take our property away. And we have enough problems with the restaurant. We do not want to create any more problems with a sidewalk cafe."

Q Did Mr. Von Gutfeld say anything to you? Do you recall at that time?

A Yes, yes. He said to me, who do you know from the City and how much does it cost you to receive license? And I said what do you mean, "Receive license"? To whom do you know, how much did it cost you, to whom did you pay from the City? And I said, "Watch out what you say here. I never approached the City and we never paid anyone."

APPENDIX I

Supreme Court,
Appellate Division

FIRST DEPARTMENT,
February 1991

JUN 25 1991 /STAMP/

Francis T. Murphy, P.J.
E. Leo Milonas
David Ross
Sidney H. Asch
George Bundy Smith, JJ.

600 West 115th Street Corp.,
Plaintiff-Respondent,

-against-

Robert Von Gutfeld,
Defendant-Appellant,

42675

The appellant herein appeals from an order of the Supreme Court, New York County (Karla Moskowitz, J.) entered on or about April 30, 1990, which, *inter alia*, granted respondent's motion for leave to amend the complaint to set forth appellant's actual defamatory words, increase the ad damnum clause from $2,000,000 to $3,000,000 and to add a punitive damage claim for $4,000,000 and denied appellant's cross-motion for summary judgment dismissing the complaint.

Mark S. Moroknek, of counsel (Ayers & Thompson, attorneys) for defendant-appellant,

David S. Friedberg, attorney for plaintiff-respondent.

ROSS, J.

The issue presented is whether the oral statements of the defendant concerning the plaintiff corporation, made during a public meeting of a Manhattan Community Board, are defamatory or constitutionally protected expressions of opinion.

In 1985, an apartment building (building), located at 600 West 115th Street, Manhattan, converted to cooperative ownership. On the street level of that building are four commercial condominium units, which together with the cooperative residential units, comprise a condominium governed by a Board of Managers (Board).

Since 1987, one of the building's condominium units has been occupied by a restaurant, owned and operated by 600 West 115th Street Corp. (corporation), under the tradename "GRANDMA'S". Initially, the corporation rented the unit from the building sponsor, Coronet Properties Company (Coronet), and, since the date Coronet sold same to Excelsior Associates (Associates), the corporation has rented from Associates.

In March 1988, the corporation filed an application with the City of New York Department of Consumer Affairs (Department) for a license to, in substance, construct an enclosed sidewalk cafe, adjacent to its restaurant, in front of the building. By letter, dated April 28, 1988, the Department rejected the application, upon the ground that the corporation had not received prior approval from the Board.

Subsequently, the corporation submitted to the Department, in support of its sidewalk cafe application, an affidavit of consent from

Associates. In response, by letter, dated October 3, 1988, the Department, in substance, informed counsel for the Board that the application had been forwarded "to City Planning for approval", since "[t]he Department will not become the arbitrator as to whether or not the applicant has the right to construct a sidewalk cafe since they have submitted what appears to be a valid consent to do so. Thus, if you [the building Board] wish to pursue the position that the [condominium] owner does not have the right to build, you should take whatever steps are necessary to obtain a declaratory judgment which supports your position. In the interim, the Department will continue to process the application which, as you know, must go before the Community Board and the Board of Estimate prior to final approval..." (see, for a copy of this letter, Record on Appeal (RA), at 260) [material in brackets added].

On October 11, 1988, Community Board No. 9, Manhattan, held a public meeting on the subject of the corporation's application for the enclosed sidewalk cafe. Prior to the meeting, the Community Board staff alerted the public by, *inter alia*, filing a public hearing notice with the City Planning Commission for insertion in the City Record, mailing notices to one thousand persons, who were community residents and elected officials, and posting flyers in stores and buildings, located in an area extending from "110th Street to 155th Street from the Hudson to Edgecombe Avenue" (see, RA, at 166).

For more than thirty years, Mr. Robert J. Von Gutfeld has resided in the building, and since the building's conversion to cooperative ownership, he has "been a shareholder and a lessee under the proprietary lease corresponding to Apartment 113... " (see, RA, at 92). Further, Mr. Von Gutfeld served as President of the Board from March 1985 to June 1988, and, since June 1988, he has served as a member of the Board's Building Committee.

While President of the Board, Mr. Von Gutfeld has stated "a number of problems arose as the result of... [the corporation's]

operation of the restaurant. Among them were offensive smells in the building due to the ventilation system in the restaurant and parking problems caused by employees of the restaurant..." (see, RA, at 93) [material in brackets added].

After his arrival at the Community Board public hearing, Mr. Von Gutfeld filled out a registration statement, indicating he wished to speak against the sidewalk cafe. In that statement, Mr. Von Gutfeld wrote "[t]he licensing of the cafe extension is in violation of the Black Book of the Coop. Consumer Affairs wrote that they would issue no permit without Condo Board approval. They did anyway. The permit is therefore fraudulent" (see, for a copy of that statement, RA, at 263) [material in brackets added].

Thereafter, Mr. Von Gutfeld spoke to the persons assembled, and, in the course of his remarks, he stated, in pertinent part, that the building "has been denigrated by this restaurant and is going to be denigrated further... Now they [the corporation] want to take the sidewalk away. And whose to benefit? Their benefit. And why do they want to do it? Because they have an illegal lease with Coronet that said they could take the sidewalk... Therefore this entire lease... is as fraudulent as you get; and it smells of bribery and corruption..." (see, RA, at 23) [material in brackets added].

Following the meeting, Community Board No. 9 voted to deny the corporation's application. Further, by letter, dated March 15, 1989, the Department advised the corporation that it was no longer processing the application, since the building's Board had not given its consent.

In November 1988, the corporation (plaintiff) commenced a defamation action against Mr. Von Gutfeld (defendant) to recover damages, based upon the defendant's use of such words as illegal, fraudulent, bribery and corruption, when he spoke against the construction of the enclosed sidewalk cafe. The complaint alleges, *inter alia*, that defendant knew that his defamatory statements were

false, and that, as a result, plaintiff's reputation, good name and the integrity of its business were damaged. Defendant denied making such statements.

Issue was joined, and during an Examination Before Trial (EBT) of Community Board No. 9's District Manager, the parties learned for the first time that defendant's remarks as well as those of other participants in the public meeting, had been tape recorded. Thereafter, the defendant's audio and voice analysis expert prepared, from that cassette and/or audio tape, a transcript (see, for a copy of that transcript, RA, at 102-114, and defendant's remarks appear at 111-113).

Soon after receiving a copy of the tape, containing the words actually uttered by defendant, plaintiff moved for leave to amend the complaint to, *inter alia*, set forth defendant's exact defamatory words, which are the portion of defendant's remarks quoted *supra*, increase the *ad damnum* clause from Two Million to Three Million Dollars, and to add a punitive damages claim for Four Million Dollars. In response, defendant cross-moved for summary judgment, dismissing the complaint. By order, entered April 30, 1990, the IAS Court, *inter alia*, granted plaintiff's motion to amend the complaint, and denied defendant's cross-motion. Defendant appeals.

While the New York State Constitution, Article 1, §8, states, in pertinent part, "[e]very citizen may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right...*:, [emphasis added], and, repeatedly the Court of Appeals has held that this language guarantees to the citizens of this State a broader right of free expression than that contained in the First Amendment to the United States Constitution (*Immuno AG v Moor-Jankowski*, 77 NY2d 235, 249 (1991), on remand from ___ US ___, 110 S.Ct. 3266 (1990), and *People ex rel Arcara v Cloud Books*, 68 NY2d 553, 557-558 (1986)), the Court of Appeals has also cautioned "*[n]o First Amendment protection enfolds false*

charges of criminal behavior... [citations omitted]... " (*Rinaldi v Holt, Rinehart*, 42 NY2d 369, 382 (1977)) [material in brackets and emphasis added].

Our examination of the development of the law of defamation in this State clearly indicates the continual struggle to strike an appropriate balance between the Constitutional right of a person to freely and openly express his or her opinion and society's interest in protecting reputations from false and/or derogatory words.

The Restatement of the Law of Torts defines a defamatory communication as a comment which "tends so to harm the reputation of another as to lower him [or her] in the estimation of the community or to deter third persons from associating or dealing with him [or her]" (see, Restatement (Second) of Torts §559 (1977)) [material in brackets added].

It is well established law in New York that "words constitute slander per se if they impute... the commission of a crime... or if they... affect plaintiff in his trade, occupation or profession... [citations omitted]..." (*Privitera v Tn of Phelps*, 79 AD2d 1, 3 (1981), *appeal dsmd* 53 NY2d 796 (1981), and *Moore v Francis et al.*, 121 NY 199, 203 (1890)) [material in brackets added].

Recently, the United States Supreme Court, in *Milkovich v Lorain Journal co.*, ___ US ___, 110 S.Ct. 2695, 2707 (1990), stated that, in view of the existing constitutional protections, there is no need to create a "separate constitutional privilege for 'opinion'... [in order to] ensure the freedom of expression guaranteed by the [Federal]First Amendment..." [material in brackets added]. Further, that Court held "that a statement on matters of public concern must be provable as false before there can be liability under state defamation law..." (*Milkovich v Lorain Journal Co., supra* at 2706) [material in brackets added].

In order to illustrate the issue of falsity, as it relates to an assertion of fact contained in a statement of opinion, the Supreme court gives

the following example, in *Milkovich v Lorain Journal Co., supra* at 2706, fn. 7, "[f]or instance, the statement 'I think Jones lied,' may be provable as false on two levels. First, that the speaker really did not think Jones had lied but said it anyway, and second that Jones really had not lied. It is, of course, the second level of falsity which would ordinarily serve as the basis for a defamation action, though falsity at the first level may serve to establish malice where that is required for recovery...".

The fifty states, "so long as they do not impose liability without fault,... may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual..." (*Gertz v Robert Welch, Inc.*, 418 US 323, 347 (1974), and *Milkovich v Lorain Journal Co., supra*, at 2704)).

Almost four years before the *Milkovich v Lorain Journal Co., supra*, decision, the Court of Appeals held that, in New York State defamation actions, the determination of "whether a given statement expresses fact or opinion... is one of law for the court and one which must be answered on the basis of what the average person hearing or reading the communication would take it to mean... [citations omitted]. There is no definitive test or set of criteria... [citation omitted]. The essential task is to decide whether the words complained of, considered in the context of the entire communication and of the circumstances in which they were spoken or written, may be reasonably understood as implying the assertion of undisclosed facts justifying the opinion... [citation omitted]..." (*Steinhilber v Alphonse*, 68 NY2d 283, 290 (1986)).

Subsequent to the decision in *Milkovich v Lorain Journal Co., supra*, although the Court of Appeals re-examined the New York State defamation standard, in the light of that United States Supreme Court opinion, it still concluded "that... the standard articulated and applied in *Steinhilber [supra]* furnishes the operative standard in

this State for separating actionable fact from protected opinion..." (*Immuno AG v Moor-Jankowski, supra* at 252).

Our review of the record indicates that defendant's remarks about the plaintiff's sidewalk cafe, quoted *supra*, are entitled to a qualified or conditional privilege, since they were made "in the conduct of his own affairs, in a matter where his interest... [was concerned]..." (44 NY Jur2d Defamation and Privacy §73, at 37, and *Park Knoll Associates v Schmidt*, 59 NY2d 205, 210-211 (1983)).

However, in *Toker v Pollack*, 44 NY2d 211, 219 (1978), the Court of Appeals held that "communications protected by a qualified privilege do not provide the communicant with an immunity against the imposition of liability in a defamation action. A qualified privilege does, however, negate any presumption of implied malice flowing from a defamatory statement, and places the burden of proof on this issue upon the plaintiff... [citations omitted]..." [material in brackets added]. Further, a qualified or conditional "privilege is conditioned on its proper exercise, and cannot shelter statements published with malice or with knowledge of their falsity or reckless disregard as to their truth or falsity..." (*Loughry v Lincoln Bank*, 67 NY2d 369, 376 (1986)).

The President of the plaintiff corporation, Mr. Nicolaos Namaes, testified at an EBT that he had a face-to-face conversation with defendant in front of the building, on October 10, 1988, which was the day before defendant spoke, at the Community Board meeting, against approving the sidewalk cafe. In pertinent part, Mr. Mamaes testified the defendant "said to me, who do you know from the City and how much does it cost you to receive [a] license'? And I said what do you [defendant] mean, 'Receive license'?To whom do you know, how much did it cost you, to whom did you pay from the City? And I said, 'Watch out what you say here. I never approached the City and we never paid anyone[']" (see, RA, at 338) [material in brackets added].

Defendant now admits (see, RA, at 97) that he said "this entire lease... is as fraudulent as you get and it smells of bribery and corruption..." (see, defendant's certified transcript of the Community Board hearing, RA, at 112-113).

At an EBT, the defendant testified that, although he used the word "fraudulent" at the Community Board hearing, he had "no idea" who had been defrauded, and he did not recall using the words "it smells of bribery and corruption" (see, RA, at 265-266).

For more than a century "the Court of Appeals... [has] held that before words charging plaintiff with a crime... [become] actionable per se, they must impute to plaintiff the commission of an indictable offense upon conviction of which punishment may be inflicted... [citations omitted]..." (*Privitera v Tn of Phelps, supra* at 3, and *Anonymous*, 60 NY 262, 264 (1875)). Applying this rule to the instant words, we find that plaintiff has alleged slander per se in this complaint, since bribery is "an indictable offense upon conviction of which punishment may be inflicted..." (*Privitera v Tn of Phelps, supra*, and see Penal Law §§200.00, 200.03 and 200.04, which describe the type of bribery offenses a non-public servant may commit, involving a public servant).

Since it has repeatedly been held that a corporation can be defamed, plaintiff has the necessary standing to commence this action (see, for example *N.Y. Society v MacFadden Publications*, 260 N.Y. 167, 169 (1932), *First Nat. Bank v Winters*, 225 N.Y. 44, 52 (1918), and *Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation*, 75 Colum. L Rev 963 (1975)).

As discussed *supra*, although defendant admitted he had no evidence of either fraud or bribery or corruption, he nevertheless used those words in his remarks against the sidewalk cafe. Accordingly, it is fair to assume defendant's statements that plaintiff had committed a fraud, or bribery and corruption, were made with

reckless indifference to the facts. We note that, in order to give credibility to those remarks, defendant prefaced them with reference to his more than thirty years association with the building, in capacities such as tenant, shareholder, and part of cooperative management (see, RA, at 111-112).

Applying the New York defamation standard of considering the words complained of "in the context of the entire communication and of the circumstances in which they were spoken or written..." to the instant matter, we find that the context in which defendant delivered his remarks at the Community Board meeting raises a triable issue of fact, as to whether his remarks implied he knew "certain facts, unknown to his audience which... [supported] his opinion, and... [were] detrimental to the person about whom he...[was] speaking..." (*Steinhilber v Alphonse, supra* at 290) [material in brackets added].

We do not believe that one can, as a matter of law, decide how the average person, hearing defendant's allegations, would interpret same as to whether or not plaintiff had actually bribed, corrupted or otherwise obtained the license by some fraud. This question is better left to the trier of the facts. This is particularly so as defendant's comments are reasonably susceptible of a defamatory connotation.

In other words, we reach that conclusion, upon the basis of our finding that, as a matter of law, defendant's remarks are not clearly susceptible of only one non-defamatory interpretation. We have held that "[i]t is well settled that where the language is susceptible of more than one meaning, a determination that a defamatory construction 'is the only meaning to be placed upon the words used... would encroach upon the province of the jury. It is enough that reasonable basis exists for such an interpretation. Once that is decided, it becomes the jury's function to say whether that was the sense in which the words were likely to be understood by the ordinary and average reader' (*Mencher v Chesley*, 297 NY 94, 100...; see also *James v. Gannett Co.*, 40 NY2d, at p 419)..."

(*Arrigoni et al v Velella et al*, 110 AD2d 601, 603 (1st Dept. 1985); and see also *Loughy v Lincoln Bank, supra*, which is a case, involving a jury trial of a defamation action, involving allegations of slander).

Since there is a triable issue of fact, we find that the IAS Court correctly denied the defendant's cross-motion for summary judgment. We have stated that summary judgment "should be granted only where no genuine, triable issue of facts exists (see, *Werfel v Zivnostenska Banko*, 287 NY 91)..." (*Gibson v Am Export*, 125 AD2d 65, 74 (1st Dept. 1987).

While we agree with the dissent that a Community Board meeting is a place "where board disputes can be thrashed out in a full and free debate" (see, Dissent, at 3), we disagree with the dissent's broad brush assertion that defendant's remarks were simply opinions expressed "in the context of an open, no holds barred community discussion" (see, Dissent, at 5), since we find, as discussed *supra*, that there is a triable issue of fact, as to whether defendant's remarks were made with knowledge of their falsity or reckless disregard as to their truth or falsity. We strongly endorse the ruling that "[n]o First Amendment protection enfolds false charges of criminal behavior... [citations omitted]"... (*Rinaldi v Holt, Rinehart*, 42 NY2d, 369, 382 (1977)) [material in brackets added].

To support its position, the dissent contends that defendant's remarks were "directly analogous to a 'letters to the editor' column in a newspaper journal" (see, Dissent, at 5), and he cites the case of *Immuno AG v Moor-Jankowski, supra*. Based upon our examination of that case, we find dissent's reliance on same to be misplaced, since its facts are substantially different from the facts of the instant case.

For example, the newspaper journal in *Immuno AG v Moor-Jankowski, supra*, was not any ordinary journal, but rather was "the Journal of Medical Primatology... [which] is directed to a

highly specialized group of readers - medical doctors, researchers and the medical and science libraries of academic institutions. The average reader is thus likely not a novice in the field of medical primatology, but brings 'a well-developed understanding of the issues facing biomedical researchers using primates as research subjects' (145 AD2d, at 129)..." (*Immuno AG v Moor-Jankowski*, at 253) [material in brackets added]. And perhaps more importantly, in *Immuno AG v Moor-Jankowski, supra* at 255, the Court stated that the presumptions and predictions of the writer of the letter to the editor of that technical newspaper "would not have been viewed by the average reader of the Journal as conveying actual facts about plaintiff...". And nowhere in the subject letter in *Immuno AG v Moor-Jankowski, supra*, was plaintiff accused of any crime. Turning to the instant case, instead of a highly specialized group of individuals, we find many individuals, of extremely varied backgrounds, and knowledge, coming together to discuss a community issue. In our opinion, the two situations have nothing in common, and, therefore, the finding that the remarks, contained in the letter to the editor, in *Immuno AG v Moor-Jankowski, supra*, were not actionable has no relevance to the determination to be made in the subject case, in which plaintiff was accused of criminal conduct.

The Court of Appeals, in *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 (1983), held "[p]ermission to amend pleadings should be 'freely given' (CPLR 3025 subd [b]. The decision to allow or disallow the amendment is committed to the Court's discretion. (*Murray v City of New York*, 43 NY2d 400, 404-405)...". CPLR Rule 3025, subdivision (b), provides that a Court may grant leave to amend pleadings "at any time", and generally "[l]eave to amend pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay (CPLR 3025, subd (b); *Fahey v County of Ontario*, 44 NY2d 934, 935)..." (*McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 (1983) [material in brackets added]. Further, usually leave "to

amend an *ad damnum* clause is one for which leave should be freely given absent prejudice or surprise resulting directly from the delay... [citations omitted]..." (*Drechsel v Loblaw, Inc.*, 64 AD2d 1022 (1978)) [material in brackets added].

Since plaintiff's allegations, as discussed *supra*, fall into the category of slander *per se*, in that the objectional remarks asserted that plaintiff committed a crime, there is no requirement to plead special damages (*Matherson v Marchello*, 100 AD2d 233, 236 (1984)). Moreover, punitive damages may be recoverable herein, since defendant's liability may be based upon a showing of knowledge or false or reckless disregard for the truth (*Gertz v Robert Welch, Inc., supra* at 348-350).

Applying the legal authority, *supra*, to the proposed amended complaint, which indicates, *inter alia*, that the proposed cause of action relates back to the facts, circumstances and proof underlying the original complaint, and the parties did not learn until discovery that defendant's actual remarks had been tape recorded, we find that the IAS Court did not abuse its discretion in granting plaintiff's motion for leave to amend the complaint, as indicated *supra*.

We have considered the other contentions of the parties, and find them to be without merit.

Accordingly, order, Supreme Court, New York County (Karla Moskowitz, J.), entered April 30, 1990, which, *inter alia*, granted plaintiff's motion for leave to amend the complaint to, *inter alia*, set forth defendant's actual defamatory words, increase the *ad damnum* clause from Two Million to Three Million Dollars, and to add a punitive damage claim for Four Million Dollars, and denied defendant's cross-motion for summary judgment, dismissing complaint, is affirmed, with costs.

All concur except Milonas and Asch, JJ. who dissent in an Opinion by Asch, J.

ASCH, J. (dissenting)

I dissent and would grant defendant's cross-motion for summary judgment dismissing the complaint.

The remarks of defendant, Robert Von Gutfeld, on the specific matter in issue at the public community board hearing is precisely the type of expression which is protected, at least under the New York State Constitution, and is not actionable. This conclusion is mandated by *Immuno A.G. v Moor-Jankowski*, 74 NY2d 548, (rev'd, and remanded ___ US ___, for reconsideration in light of *Milkovich v. Lorain Journal Co.*, 497 US__, 110 S. Ct. 2695, and upon reconsideration, 77 NY2d 235, adhering to same result).

Defendant, Von Gutfeld, has been a shareholder in the cooperative-condominium apartment building, residing there for 33 years and was president of the building's Board of Managers from 1985 to 1988. Since June, 1988 he has served on the Board's building committee.

At the street level of the building one commercial condominium unit is occupied by "Grandma's Restaurant" which has been owned and operated by the plaintiff since 1987.

In March 1988 the plaintiff applied for a permit from the City of New York to enable it to have a sidewalk cafe extension. Prior approval was never obtained from the Board of Managers and in a letter dated April 28, 1988 the City Department of Consumer Affairs rejected the application stating:

> "... the Board must approve any construction of a sidewalk cafe as the sidewalk is specifically included as a common element of the condominium plan."

Again without first obtaining the approval of the Board, plaintiff's application was resubmitted to the Department of Consumer Affairs. The application was once again rejected in a letter dated March 15, 1989.

However, before that final rejection occurred, the plaintiff submitted to Consumer Affairs an affidavit of consent from Excelsior Associates, owner of the commercial condominium but never obtaining approval from the Board of Managers.

The basis of defendant's statements and his action stemmed from Consumer Affairs initial treatment of that "consent" by Excelsior.

On October 3, 1988 Consumer Affairs wrote to all concerned indicating that it would not become the arbitrator as to whether or not the applicant had the right to construct a sidewalk cafe. At that point, Consumer Affairs thought the affidavit from the condominium owner was a "valid consent". Subsequently, as noted, in March of 1989, it stated that it was unable to continue processing the application because it did not have an affidavit of consent from the condominium Board of Managers. But, before this clarification many of the parties assumed that somehow the application would be approved by the City agency even without consent from the Board of Managers.

A public hearing was scheduled by Community Board No. 9 of Manhattan. Mr. Von Gutfeld, among others, spoke at the hearing. He addressed various matters; that the building did not need "beautification by a restaurant", problems with offensive smells and parking, his feeling that the building had been "denigrated" by plaintiff's restaurant and would be "denigrated further" by the proposed sidewalk cafe.

Mr. Von Gutfeld noted for background that plaintiff had not obtained prior approval of the Board of Managers and that previously the Department of Consumer Affairs had, on that ground, rejected the application. Addressing the apparent sudden reversal of Consumer Affairs' position, he said, that the manner in which that agency handled the matter "smelled of bribery and corruption."

Thus, most simply, what defendant expressed at the Community Board meeting, which is, in effect, the hallowed New England "town

hall" meeting, in modern urban dress, where board disputes can be thrashed out in a full and free debate, were either explicit opinions or in context and under the circumstances clearly his opinion and not stated as a factual matter.

While *Immuno A.G. v. Von Moor-Jankowski*, ___ NY2d ___ decided January 15, 1991, dealt with a letter to the editor, the comments by Judge Kaye are equally applicable to the circumstances here - a community board meeting - our own modern version of the "town hall" forum.

"Significantly, for many members of the public, a letter to the editor may be the only available opportunity to air concerns about issues affecting them. A citizen troubled by things going wrong 'should be free to publish [the] letter. It is often the only way to get things put right.' [citation omitted] The availability of such a forum is important not only because it allows persons or groups with views on a subject of public interest to reach and persuade the broader community but also because it allows the readership to learn about grievances, both from the original writers and from those who respond, that perhaps had previously circulated only as rumor; such a forum can advance an issue beyond invective. Finally, at the least, the public may learn something, for better or worse, about the person or group that wrote such a letter [citation omitted]. Thus in determining how the average person would view McGreal's letter, we take into account that it is a letter to the editor and that:

> "[t]he common expectation of a letter to the editor is not that it will serve as a vehicle for the rigorous and comprehensive presentation of factual matter but as one principally for the expression of individual opinion' [citation omitted].
>
> ... We conclude that the body of the letter in issue communicated the accusations of a group... and that the writer's presumptions and predictions as to what 'appeared to be' or 'might well be' or 'could well

> happen' or 'should be' would not have been viewed by the average reader of the Journal as conveying actual facts about plaintiff" (*Immuno A.G., supra* at ____).

Likewise, in this case, the defendant's expression that the events "smelled of" expressed his presumption as to what "appeared to be" and was made in the context of an open, no holds barred community discussion, in a favored public forum, directly analogous to a "letters to the editor" column in a newspaper journal. Consequently, it is protected under our State Constitutional free speech guarantee as opinion.

M-875 *600 W. 115th St. Corp. v Von Gutfeld*

Motion to strike defendant's reply brief is denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: June 25, 1991
/STAMP/

APPENDIX J

Supreme Court of the State of New York

COUNTY OF NEW YORK

600 West 115th Street Corp.,

Plaintiff,

- against -

Robert von Gutfeld,

Defendant.

Index No. 24629/88

VERIFIED AMENDED COMPLAINT

Plaintiff by its attorney, David S. Friedberg, Esq., for its amended complaint against the defendant, alleges:

1. Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of New York.

2. Plaintiff operates and maintains an eating establishment located at 2937 Broadway, New York, New York under the trade name, "GRANDMA'S".

3. Upon information and belief defendant resides in the building in which plaintiff's eating establishment is located.

4. On or about March 21, 1988 plaintiff filed an application with the City of New York Department of Consumer Affairs for consent

to occupy and use the sidewalk space abutting plaintiff's premises for the construction and maintenance of an enclosed sidewalk cafe ("Application").

5. On October 11, 1988 plaintiff appeared at a public hearing of the Community Board #9, Manhattan, 565 West 125th Street, New York, New York 10027 in connection with its Application.

6. At that hearing and in the presence of all persons in attendance, defendant maliciously stated as follows:

> "Hello Ladies and gentlemen.
>
> "My name is Robert Von Gutfeld. I've lived at 600 West 115th Street for 32 1/2 years starting as a graduate student at Columbia.
>
> "Our building is a very beautiful building; and it was built by a very famous architect Iello, who built many buildings in the neighborhood [*bleep*]*, Clairmont, in the area of 115th Street.
>
> "I don't think his building needs beautification by a restaurant. I think he knew what he was doing. It's a beautiful building. It is close to many other buildings. But it certainly will not be edified or graced by a restaurant.
>
> "My question is: when the City of New York [*bleep*] giving away public property?
>
> "We see all over New York [*bleep*] are littered with vendors. They do not have insurance. Vendors who sell toilet seats. Vendors who sell books. All these things at whose expense? The public. We are getting our sidewalks taken away.

"Now it so happens that as Chairman of the Board of this Condominium for three years, tenant's committee for twelve, and head of the steering committee for two, I am very familiar with the building.

"I am also familiar with the hundreds of violations that we have cited the restaurant [*bleep*] in place.

"When they opened up, the stench ventilated was so great that we fought for hours at Board meetings to do something about it. Finally, Mr. Mamaes, said 'yes there was something wrong, I'll put in a new system.'

"We waited twelve weeks for that system to be put in. Our lobby smelled like a grease pot; and it still stinks on [*bleep*] because there is no way to ventilate that properly without a chimney that goes [*bleep*] twelve floors or higher than the nearest building.

"The place has been denigrated by this restaurant and is going to be denigrated further.

"These people that work at Mamais illegally [*bleep*]. Our cross walks are taken up. You want evidence of that; call up the 26th Precinct. I have reported Mamais dozens of times. They block the entire cross walk with their car; go into Mamais restaurant; and think they could get away with it.

"Well I am sick of that and I have reported it; and the police occasionally give tickets.

"Now they want to take the sidewalk away. And whose to benefit? Their benefit. And why do they want to do it? *Because they have an illegal lease with Coronet that said they could take the sidewalk.*

"Well they can't have the sidewalk because this book was approved by the State Attorney General; and on page seventy-three this book says that the side [*bleep*] walk is a common element and only the Condo which I was a member for three years can decide if and when they should be [*bleep*] oved.

"Therefore this entire lease and proposition is as fraudulent as you can get; and it smells of bribery and corruption.

"This is what they want to put to the people of New York. Give'm the restaurant. Give them the subway platforms so that the vendor can park there.

"And we the people are left with nothing. We have seven feet left to walk. Try to get a wheelchair through that with people walking in opposite direction when this proposed beautification takes place.

"On top of that we have *pipes running from Mamais' restaurant in his refrigeration [bleep] and [bleep] illegally.*

"One of them exploded and put [*bleep*] in our whole basement. That's how you are in compliance with the law.

"The contract is in complete discompliance with everything Consumer Affairs said; and I have the correspondence which says no restaurant is to be built unless the Condominium Board give permission.

"No such permission has ever been granted and I am sure as hell not going to grant it now."

"Thank you."

(Emphasis added. [Bleep] refers to inaudible word)

7. Defendant's statements that:

> "The place has been denigrated by this restaurant and is going to be denigrated further... Because they have an illegal lease with Coronet that said they could take the sidewalk... therefore this entire lease and proposition is as fraudulent as you can get; and it smells of bribery and corruption... pipes running from Mamais' restaurant... illegally... the contract is in complete discompliance with everything Consumer Affairs said..."

were false and defamatory and uttered with intent to injure plaintiff.

8. At the time of such utterances the defendant knew or should have known that the statements contained therein were untrue.

9. The statements referred to in paragraphs "6" and "7" of this amended complaint so uttered were calculated to and did hold up the plaintiff to public scorn, hatred and ridicule; and those statements did greatly injure plaintiff in its reputation, good name and integrity of plaintiff's business and caused loss of business; and did greatly injure plaintiff in its dealings with Community Board #9 Manhattan, to obtain approval of plaintiff's application, to its damage in the sum of three million ($3,000,000.) dollars.

10. By reason of the foregoing, plaintiff is entitled to recover punitive damages in the sum of four million ($4,000,000.) dollars.

WHEREFORE, plaintiff demands judgment against defendant on its cause of action in the sum of three million ($3,000,000.) dollars; and punitive damages in the sum of four million ($4,000,000.) dollars, together with the costs and disbursements of this action.

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APPENDIX K

Supreme Court of the State Of New York

EB4

COUNTY OF NEW YORK: IAS PART 9

600 WEST 115th STREET CORP.,

Plaintiff,

-against-

ROBERT VON GUTFELD,

Defendant.

Index No. 24629/88

KARLA MOSKOWITZ, J.:

Plaintiff 600 West 115th Street Corp., moves 1) pursuant to CPLR 3025[b] for leave to serve an amended complaint and; 2) pursuant to CPLR 3216 to strike defendant's answer for his failure to comply with the court's order dated April 19, 1989 directing he provide plaintiff with the names and addresses of all his witnesses. Defendant Robert Von Gutfeld ("Von Gutfeld") cross moves pursuant to CPLR 3212 to dismiss the complaint as a matter of law.

That branch of the plaintiff's motion for an order striking defendant's answer is denied. As ordered by the court, the defendant has furnished plaintiff with a list of his witnesses (Affirmation in Opposition, Exh. G).

Plaintiff served its original complaint around November 12, 1988. Issue was joined around December 30, 1988. Plaintiff now

seeks to serve and file an amended complaint to add a second cause of action for libel and to increase its ad damnum for compensatory damages from $2,000,000 to $3,000,000 (Mamaes Affidavit, Exh. A).

Defendant maintains that, since documentary and other discovery has been completed and plaintiff should have asserted the alleged second claim in its original complaint, dfendant will be severely prejudiced in his defense of this action if leave to serve the amended complaint is granted. This argument is without merit.

Leave to amend should be freely given, especially when the denial of the motion for leave to amend would create a greater prejudice than would the granting of it (*Murray v. City of New York*, 43 NY2d 400). Absent real prejudice or surprise, an amendment to a complaint will ensure full litigation of the controversy (*see, DeForte v. Allstate Ins. Co.*, 66 AD2d 1028). The proposed cause of action relates back to the facts, circumstances and proof underlying the original complaint (*Caffaro v. Trayna*, 35 NY2d 245), even if it would be time barred if instituted separately (*see, Dittmar Explosives, Inc. v. A.E. Ottaviano, Inc.*, 20 NY2d 498). Plaintiff has met its burden with regard to delay, surprise and prejudice (*Goldstein v. Brogan Cadillac Oldsmobile Corp.*, 90 AD2d 512).

Accordingly, that branch of plaintiff's motion for an order granting it leave to serve an amended complaint pursuant to CPLR 3025[b] is granted.

Defendant's cross motion for summary relief is denied. First, summary judgment pursuant to CPLR 3212 is premature as an amended answer has not been served and issue has not been joined. However, in the interests of judicial economy the court will address the amended pleading and defendant's contentions.

This action for libel and slander arises from certain oral and written statements defendant allegedly made about plaintiff's

principal and shareholder, Nicolas Mamaes ("Mamaes") at a public hearing held by Community Board No. 9, on October 11, 1988, in New York, New York. The plaintiff has standing to bring an action for defamation (*see, New York Society for Suppression of Vice v. MacFadden Publications, Inc.*, 260 NY 167). Defendant Von Gutfeld is a shareholder in a cooperative corporation which owns the building located at 600 West 115th Street (the "building"), and where plaintiff had operated its restaurant business, "Grandma's," since 1987. This restaurant is located on the first floor. Von Gutfeld has resided in the building for over 33 years. Plaintiff leases from the owner of the commercial unit, Excelsior Associates. The cooperative corporation is governed by the Board of Managers ("the Board"). Between March 1985 and June 1988, Von Gutfeld served as the Board's president. He now serves on the Board's Building Committee.

Apparently, on March 21, 1988, plaintiff submitted an application to the New York City Consumer Affairs Department and the Planning Commission for a sidewalk cafe license and permit to construct an enclosed sidewalk cafe adjacent to the restaurant in front of the building. After finding technical compliance, the City's Planning Commission referred the application to local Community Board No. 9 ("Community Board 9") with jurisdiction over the provposed site. On October 11, 1988, Community Board 9 held a public hearing to solicit opinions from community residents concerning the application. At this hearing, residents and other interested parties were allowed to comment either in favor or against plaintiff's application. After several speakers, the defendant took the podium and voiced his objection. Plaintiff alleges that the defendant made the following slanderous statement at this hearing:

> The restaurant denigrates the building... I don't understand what is going on with the City. How could the City give the approval. To me, it smells of bribery and corruption. Mamaes had to pay off the City to get the license.

Moreover, plaintiff alleges that defendant printed a libelous statement in his application to Community Board for permission to speak at the hearing. That document is entitled "Registration to Speak at the Public Session" (Friedberg Reply Affirmation, Exh. D). The alleged libelous statement reads in pertinent part:

> The licensing of the cafe extension is in violation of the Black Book of the Coop. Consumer Affairs wrote they would issue no permit without Condo Board approval. They did anyway. The permit is therefore fraudulent. (emphasis added)

Plaintiff alleges these statements are defamatory in nature and accuse plaintiff of criminal conduct.

Defendant denies that he made the oral statement in the form pleaded by plaintiff. Rather, he submits a transcript of the taped hearing which he had transcribed by an alleged professional: "When does the City of New York start giving away public property?"..., "the [Premises] has been denigrated by [plaintiff's] restaurant...." "[the] entire lease and composition is as fraudulent as you can get and it smells of bribery and corruption." (Notice of Cross Motion, Owen Aff., lv. pp. 10-12). There is no specific language in the transcript indicating that Mamaes made payoffs to officials in order to receive the license or permit. Plaintiff acknowledges the receipt of a copy of this transcript but disputes its actual content. Nevertheless, assuming the statements were in the form pleaded, defendant maintains that they are absolutely privileged, and, therefore, are constitutionally protected expressions that cannot give rise to any liability. Von Gutfeld argues, alternatively, that these statements are opinions protected by the qualified privilege provided under the common interest doctrine and are not actionable, absent demonstration of actual malice. He now moves for summary relief.

Such a defense is available with respect to any communication made in good faith, with belief in its truth, upon any subject matter

in which the party making it has an interest, or in reference to which he has a duty, so long as the communication is made to a person having a corresponding interest or duty. Such an interest or duty may be legal, social, moral or familial (*Park Knoll Associates v. Schmidt*, 59 NY2d 205, *on remand*, 99 AD2d 772; *Byam v. Collins*, 111 NY 143). Even though the statement is defamatory, if the person communicating it enjoys a qualified privilege, she is not subject to liability unless, in making the statement, she acted with malice, i.e., ill will, spite or hostility (*Shapiro v. Health Ins. Plan of Greater New York*, 7 NY2d 56). It is well settled that pure opinion, however misguided or vituperative, is entitled to the absolute protection of the state and federal consitutional free speech guarantees (*see, Immuno, A.G. v. J. Moor-Jankowski*, N.Y.L.J., December 20, 1989, p. 21, col. 1, *affirming*, 145 AD2d 114; *see also, Ollman v. Evans*, 750 F2d 970, 974-975, n6 [DC Cir] [en banc], *cert denied*, 471 US 1127).

Plaintiff does not dispute that the statements were made in conjunction with a public hearing concerning a common interest but contends that, while a qualified privilege may attach to such statement, that privilege is conditioned "on its proper exercise" (*citing, Loughry v. Lincoln First Bank, N.A.*, 67 NY2d 369; Plaintiff's Memorandum In Opposition, p. 12). This privilege "cannot shelter statements published with malice or [made] with knowledge of their falsity or reckless disregard as to their truth or falsity" (*Loughry v. Lincoln First Bank, N.A., supra)*Plaintiff has maintained that these statements are untrue and were intended to injure its reputation, good name and integrity (Verified Amended Complaint, paras 8 and 12).

Generally, it is a question of law for the court to decide whether certain expressions constitute statements of fact or expressions of opinion (*Silsdorf v. Levine*, 59 NY2d 8, *cert denied*, 464 US 831). The words complained of are to be "considered in the context of the entire communication and of the circumstances in which they were

spoken" *(Steinhilber v. Alphonse*, 68 NY2d 283, 289). However, the courts will not strain to interpret the words in their most inoffensive sense in order to hold them nonslanderous *(Noward v. Maguire*, 22 AD2d 901).

In this instance, the statements alleged, i.e., bribery, corruption, fraudulent activity, in the context and place where they were made, are not clearly susceptible to only one interpretation. The rule is that where words taken in their natural and ordinary meaning are susceptible to a defamatory connotation then it is for the jury to decide how it would be understood by the average reader *(James v. Gannett Co.*, 40 NY2d 415, 419; *see also, Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 NY2d 456, 2 NY PJI 705 [Defamation-Libel by Extrinsic Fact] and 710 [Defamation Slander Per Se], 1989 Supplement, PJI 3.24 and 3.25, and respective comments).

It cannot be said as a matter of law that the average recipient of these statements would not interpret them as meaning that plaintiff had actually bribed, corrupted or fraudulently obtained the license or permit. Accordingly, plaintiff is entitled to have a jury determine the issue *(cf. Carney v Memorial Hospital and Nursing Home of Greene County*, 64 NY2d 770, 772).

Accordingly, defendant's cross motion is denied. Plaintiff's motion is granted to the extent indicated. The amended complaint in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry.

The Clerk is directed to send a copy of this decision and order before filing and entry.

Dated: April 20, 1990.

x/signature
A.J.S.C.

APPENDIX L

Exhibit I - Letter, Dated October 3, 1988, From Department of Consumer Affairs to Errol A. Brett

Department of Consumer Affairs
80 Lafayette Street
New York, NY 10013
Angelo J. Aponte, Commissioner

October 3, 1988

Errol A. Brett, Esq.
Schwarzfeld, Ganfer & Shore
112 Madison Avenue
New York, NY 10016-7476

Re: Application No. 833600

Dear Mr. Brett:

This letter is written to clarify the Department's position with respect to the issuance of a license for an enclosed sidewalk cafe at 600 West 166th Street.

We have received from the applicant an Affidavit of Consent by the commercial owner for a sidewalk cafe. You have stated on behalf of the condominium that the applicant does not have the authority to construct the cafe. As is the usual course of business, we have forwarded the application to City Planning for approval. The Department will not become the arbitrator as to whether or not the applicant has the right to construct a sidewalk cafe since they have

submitted what appears to be a valid consent to do so. Thus, if you wish to pursue the position that the owner does not have the right to build, you should take whatever steps are necessary to obtain a declaratory judgment which supports your position.

In the interim, the Department will continue to process the application which, as you know, must go before the Community Board and the Board of Estimate prior to final approval.

Yours truly,

/signature/
Patricia R. Kruger
General Counsel

PRK/cn
Phone: 566-7649

cc: David S. Friedberg, Esq.
521 Fifth Avenue
New York, NY 10017

Nicholaos Mamaes
President
2937 Broadway
New York, NY 10027

Debra Silberstein
Assistant Corporation Counsel